A

TEH CHENG CHOO

v.

MALAYAN BANKING BHD

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABDULL HAMID EMBONG JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-503-2000]

C

26 FEBRUARY 2009

LAND LAW: *Power of attorney - Cancellation and discharge - Pleadings - Whether no cause of action established - Fraud or misrepresentation - Forgery of power of attorney - Rights of chargee -*

D *Bona fide purchaser - Indefeasibility of interest*

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Whether no cause of action established*

LAND LAW: *Charge - Rights of chargee - Bona fide purchaser -*

E *Indefeasibility of interest*

This was an appeal by the appellant against the decision of the High Court dismissing her claim against the respondent, Malayan Banking Bhd ('Maybank'), in respect of certain land ('subject

F land') of which she was the registered proprietor. The appellant had commenced proceedings by way of an originating motion ('OM') to declare as void a Power of Attorney ('PA') she executed in favour of the first defendant ('D1') and to have the PA cancelled and discharged. The appellant's action was founded

G on fraud or misrepresentation and/or forgery of the PA. The respondent was the registered chargee of three charges executed by the third defendant ('D3'), of which D1 was a director, as security for three separate credit facilities granted to D3. The trial judge dismissed the appellant's claim and found that the appellant,

H on her own pleadings, had failed to establish a cause of action against Maybank. The judge also found as a subsidiary ground that Maybank was not a party or privy to the alleged fraud, and concluded that Maybank was a *bona fide* purchaser for value and had acquired an indefeasible interest as the registered chargee on

I the subject land.

Held (dismissing the appeal)
Per Abdull Hamid Embong JCA delivering the judgment of the court:

(1) From the OM, the only relief sought against Maybank was for a consequential order directing it to discharge the three charges. Nowhere in the OM was it pleaded that Maybank had registered the three charges against the subject land by virtue of a forged PA. A scrutiny of the appellant's affidavit in support of the OM showed that the allegation of fraud, cheating and misrepresentation was made only against D1. No averment was made against Maybank in respect of the fraud or misrepresentation. In other words, the OM did not plead any cause of action against the respondent. On this ground alone, the appeal should be dismissed. *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* (foll); *Taib Awang v. Mohamed Abdullah* (foll). (paras 14, 18, 19, 20 & 21)

(2) The judge was correct in finding that the appellant had failed to establish that Maybank was a party or privy to the alleged cheating or fraud or had any notice of the fraud. The issue of forgery of the PA, on the facts of this case, also did not arise. (paras 22, 23, 24, 25 & 26)

(3) Since the sole question was the defeasibility of Maybank's title under s. 340(2)(a) of the National Land Code, the judge had correctly determined that Maybank now stood as a *bona fide* purchaser whose title could not now be impugned. The question of deferred indefeasibility of the title was thus also not in issue. (para 27)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi menolak tuntutannya terhadap responden, iaitu Malayan Banking Bhd ('Maybank'), berhubungan dengan tanah tertentu ('tanah itu') yang mana beliau merupakan tuan punya berdaftarnya. Perayu telah memulakan prosiding melalui usul pemula ('UP') untuk mengisytiharkan sebagai tak sah sesuatu Surat Kuasa Wakil ('SKW') yang beliau telah melaksanakan atas nama defendan pertama ('D1') dan untuk mengakibatkan SKW itu dibatalkan dan dilepaskan. Tindakan perayu adalah berdasarkan fraud atau salah nyataan dan/atau pemalsuan SKW itu. Responden merupakan pemegang gadaian berdaftar tiga gadaian yang telah dilaksanakan

A oleh defendan ketiga ('D3'), yang mana D1 adalah seorang pengarahnya, sebagai cagaran untuk tiga kemudahan kredit berlainan yang diberi kepada D3. Hakim perbicaraan menolak tuntutan perayu dan mendapati bahawa perayu, atas plidingnya sendiri, telah gagal membuktikan suatu kausa tindakan terhadap
B Maybank. Hakim juga mendapati sebagai alasan subsidiari bahawa Maybank bukan satu pihak atau privi kepada fraud yang dikatakan, dan memutuskan bahawa Maybank adalah satu pembeli untuk nilai yang *bona fide* dan telah memperolehi suatu kepentingan yang tidak boleh disangkal sebagai pemegang gadaian berdaftar atas tanah itu.
C

Diputuskan (menolak rayuan)
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

D **(1)** Dari UP itu, relif tunggal yang dituntut terhadap Maybank ialah untuk satu perintah berbangkit yang mengarahkannya untuk melepaskan ketiga-tiga gadaian itu. Dalam UP itu tidak diplid di mana-mana bahawa Maybank telah mendaftarkan ketiga-tiga gadaian terhadap tanah itu melalui satu SKW yang
E dipalsukan. Suatu penelitian afidavit yang menyokong UP itu menunjukkan bahawa pengataan-pengataan fraud, menipu dan salah nyataan telah dibuat hanya terhadap D1. Tiada apa-apa pengataan yang dibuat terhadap Maybank berhubungan dengan fraud atau salah nyataan. Dalam kata-kata lain. UP itu
F tidak memplid apa-apa kausa tindakan terhadap responden. Atas alasan ini sahaja, rayuan ini patut ditolak. *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* (diikuti); *Taib Awang v. Mohamed Abdullah* (diikuti).

G **(2)** Hakim betul apabila mendapati bahawa perayu telah gagal membuktikan bahawa Maybank adalah satu pihak atau privi kepada penipuan atau fraud yang dikatakan itu atau mempunyai apa-apa notis tentang fraud itu. Isu mengenai pemalsuan SKW itu, atas fakta-fakta kes ini, juga tidak bangkit.
H

(3) Oleh kerana soalan tunggal ialah keboleh sangkalan hakmilik Maybank di bawah s. 340(2)(a) Kanun Tanah Negara, hakim telah memutuskan dengan betul bahawa Maybank kini merupakan pembeli *bona fide* dan hakmiliknya sekarang tidak
I boleh disoalkan. Soalan ketakboleh sangkalan hakmilik tangguhan, oleh itu, juga bukan menjadi isu.

Case(s) referred to:

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***

Letang v. Cooper [1965] 1 QB 232 ***(refd)***

Read v. Brown [1899] 2 QBD 128 ***(refd)***

Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 ***(foll)***

Taib Awang v. Mohamad Abdullah & Ors [1984] 1 CLJ 44; [1984] 2 CLJ (Rep) 501 HC ***(foll)***

Legislation referred to:

National Land Code, s. 340(2)(a), (3)

For the appellant - Teh Boon Eng (Lee Choon Eng with him); M/s Lee & Wong

For the respondent - Kevin Sathiaseelan (Normah Hela Daud with him); M/s David Chong & Co

[Appeal from High Court Kuala Lumpur; Originating Motion No: S4-21-55-92]

Reported by Suresh Nathan

JUDGMENT

Abdull Hamid Embong JCA:

Background

[1] The appellant commenced proceedings by way of an originating motion to declare as void a Power of Attorney (PA) dated 3 June 1988 and executed by the appellant in favour of Lim Ong Ah (the first defendant, D1) and to have the said PA cancelled and discharged.

[2] On 30 September 1993, by consent of parties the OM was ordered to be converted into a writ action and that all affidavits stand as pleadings.

[3] At the date of trial, 17 March 1999 judgment in default of appearance was entered against D1 and Salem High Country Holidays S.B. (D3).

[4] The action against D4, the Pendaftar Hak Milik Tanah Wilayah Persekutuan, was withdrawn and struck out. D4 agreed to abide to whatever order the court makes.

[5] The respondent in this appeal is D2 below, ie, Malayan Banking Bhd. (Maybank) who were the registered chargee of three charges executed by D3 as security for three separate credit facilities granted to D3. The facilities were initially granted to D3 by Hock Hua Bank Bhd and Maybank had on obtaining the issue document of title redeemed the borrowed sum and registered the three charges.

[6] The appellant's action is founded on fraud or misrepresentation and/or forgery of the PA. There was however no such averments in the originating motion (OM), although in evidence, by way of the appellant's affidavit it was alleged by her that she was a victim of "cheating and fraud" and that the PA was "false and forged".

[7] There was no allegation of fraud or being a party to such fraud against Maybank.

[8] The learned trial judge after a full *viva voce* trial dismissed the appellant's claim and found that the appellant on her own pleadings, had failed to establish a cause of action against Maybank. The learned judge also found as a subsidiary ground that Maybank was not a party or privy to the alleged fraud and concluded that Maybank was a *bona fide* purchaser for value and had acquired an indefeasible interest as the registered chargee on the subject land.

Brief Facts

[9] The appellant was the registered proprietor of the subject land. She claimed not to know D1 or D3. She denied ever executing the PA or knowing the lawyer, Lee Beng Cheang, who attested it. Lee Beng Cheang in the PA had certified that he witnessed the appellant signing the PA as its donor, in his presence.

[10] The land title was kept in a safe and the appellant's brother, Teh Cheng Tee had control over the safe and helped her to manage the property in her absence in Australia. Teh Cheng Tee too left for Australia in 1990 and had left the management of the

said land (rent collection) to his nephew Teh Yong Aun. Appellant's another brother Teh Cheng Lee and her father too had access to the safe.

[11] The land title was forwarded to Maybank by Hock Hua Bank after Maybank redeemed the land.

[12] The three charges created in favour of Maybank were executed by D1, the donee under the PA. D1 was a director of D3 and the loans were raised for D3's use.

Issue

[13] Was a cause of action established against the respondent (Maybank)?

[14] From the OM, the learned judge found that the only relief sought against Maybank was for a consequential order directing it to discharge the three charges. Nowhere in the OM was there pleaded that Maybank had registered the three charges against the land title by virtue of a forged PA. We agree with this finding of the learned judge.

[15] It is trite that every claim must disclose a cause of action. This forms the condition precedent to the commencement of an action. It none exists then the court cannot provide any remedy to the claimant. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232, described this requirement as "a factual situation, the existence of which entitles one person to obtain from the court, a remedy against another person" (see also *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126).

[16] The plaintiff therefore must prove the entire facts traversed which form the foundation of his claim in order to obtain judgment (see *Read v. Brown* [1899] 2 QBD 128). These facts make the action possible.

[17] A scrutiny of the appellant's affidavit in support of her OM shows that the allegation of fraud, cheating and misrepresentation was made only against D1.

[18] Reference to the case of *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 was made by the appellant in this appeal and in the court below. In that case a specific cause of action ie, "that the transfer made to Maybank was *void ab inito*"

was pleaded. In the present appeal, no averment was made against Maybank in respect of the fraud or misrepresentation. In other words, the OM did not plead any cause of action against the respondent.

[19] In *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* [1998] 1 CLJ 1035, this court had pronounced on the need for stating sufficient particulars to show a cause of action in the following manner:

> The instant originating summons does not contain any details of the questions on which Vijayalakshmi is seeking the court's determination or direction nor does it contain sufficient particulars so as to show what her cause of action is in respect of which she is asking relief of remedy. Merely asking the court for an injunction against Saraswathy and her firm from acting in the four remaining civil suits under the Legal Profession Act 1976 or under its Rules is not enough. The originating summons must show why she or her firm should not act in the proceedings. Since this is not shown, no cause of action is disclosed in the originating summons against Saraswathy. On this ground alone, the originating summons ought to have been dismissed.

[20] In *Taib Awang v. Mohamad Abdullah & Ors* [1984] 1 CLJ 44; [1984] 2 CLJ (Rep) 501, it was held that if a plaintiff initiates an action without a cause of action or an incomplete cause of action it is bound to be dismissed by the court.

[21] We agree with the learned trial judge that on this ground alone, this appeal should be dismissed.

Next Two Issues

[22] The learned trial judge also considered the evidence as found in the appellant's affidavit supporting her OM. Her Ladyship concluded that although there were references to fraud, cheating and misrepresentations, these were allegations made against the D1 and not Maybank. We are in agreement with the trial judge's finding that the appellant had failed to establish that Maybank was a party or privy to the alleged cheating or fraud or had any notice of the alleged fraud.

[23] The allegation of forgery of the PA was also considered by the learned judge.

[24] Forgery as defined in the concise *Oxford Dictionary,* 9th edn means "to write (a document or signature) in order to pass it off as written by another or to make a fraudulent imitation."

[25] The evidence shows that the signature on the PA was signed by the appellant in Chinese characters before an advocate and solicitor, Mr. Lee Beng Cheang. It was then duly registered in the High Court and the Land Office. D1, acting under the PA, then charged the said land thrice to Hock Hua Bank for three loans. These charges were then discharged by Maybank who granted three loans to D1. Hock Hua Bank then released the title to Maybank who subsequently had it registered.

[26] The learned judge found that this case did not concern the issue of forgery. We agree with the reason given that since the appellant said that she always sign in "English" (ie, Roman alphabet) this was not a case of an "imitation to pass off as genuine". Thus the issue of forgery did not arise.

[27] Since the sole question was the defeasibility of Maybank's title under s. 340(2)(a) NLC, the learned judge had correctly determined it pursuant to the proviso of subsection (3) ie, that Maybank now stood as a *bona fide* purchaser whose title cannot now be impugned. The question of deferred indefeasibility of the title was thus also not in issue.

[28] For these reasons, this appeal was unanimously dismissed with costs.